UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
ADMINISTRATIVE LAW JUDGE LAUREN ESPOSITO

LEWIS FOODS OF 42ND STREET, LLC, A McDONALD'S FRANCHISEE, AND McDONALD'S USA, LLC, JOINT EMPLOYERS, et al.	**Cases 02-CA-093893, et al. 04-CA-125567, et al. 13-CA-106490, et al. 20-CA-132103, et al. 25-CA-114819, et al. 31-CA-127447, et al.**
and	
FAST FOOD WORKERS COMMITTEE AND SERVICE EMPLOYEES INTERNATIONAL UNION, CTW, CLC, et al.	

GENERAL COUNSEL'S OPPOSITION TO RESPONDENT McDONALD'S USA, LLC'S MOTION FOR PROTECTIVE ORDER

The General Counsel, by the undersigned, hereby opposes the motions for protective orders filed by Respondent McDonald's USA, LLC ("Respondent" or "McDonald's")[1] and Respondent Franchisees D. Bailey Management Company, Inc., 2Mangas, Inc., Topaz Management, Inc., Mashayo, Inc., Taylor & Malone Management, Inc., Seven McD, Inc., Karavites Restaurant 6676, Inc., Karavites Restaurant 5895, Inc., K. Mark Enterprises, Inc., Lofton & Lofton V Management, Inc., RMC Enterprises LLC, and RMC Loop Enterprises LLC ("LaPointe Franchisees"). The proposals made by McDonald's and the LaPointe Franchisees are similar in all relevant respects, suffer from the same shortcomings, and are appropriately addressed together. In particular, both proposals improperly attempt to shift the burden of persuasion and lack any incentive for Respondents to act reasonably in designating materials as confidential.

[1] Respondent Franchisee Wright Management, Inc. separately filed a "me too" motion in support of the submission by McDonald's.

However, because (1) counsel for the General Counsel is amenable to executing some form of protective stipulation as a means for reducing the scope of disagreements regarding the protections to be afforded documents or testimony, (2) the proposal submitted by the non-parties and Charging Parties is more balanced than the proposals made by Respondents, and (3) a single protective order applicable to all is more efficient than a number of orders affording different protection levels to different parties, counsel for the General Counsel respectfully suggests adopting the proposed order submitted by Charging Party Service Employees International Union ("SEIU").As noted by SEIU (Motion for Protective Order, p. 2), the National Labor Relations Board ("Board" or "NLRB") has stated that Administrative Law Judges have the authority to issue protective orders. *Teamsters Local 917 (Peerless Importers)*, 345 NLRB 1010, 1011 n.7 (2005) (citing *AT&T Corp.*, 337 NLRB 689, 693 fn. 1 (2002); *National Football League*, 309 NLRB 78, 88 (1992); *United Parcel Service*, 304 NLRB 693 (1991); *Carthage Heating Co.*, 273 NLRB 120, 123 (1984); and NLRB Division of Judges Bench Book § 8–330). The Board looks to the Federal Rules of Civil Procedure and the cases interpreting them in connection with the scope and limits of subpoenas. See *Brink's Inc.*, 281 NLRB 468, 469 (1986); *CNN America, Inc.*, 353 NLRB 891, 894 (2009); *Central Telephone Co. of Texas*, 343 NLRB 987, 988–990 (2004).

There is a common-law presumption that the public shall have access to "judicial documents." *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006) (citing *United States v. Amodeo*, 44 F.3d 141 (2d Cir. 1995) (*Amodeo I*) and 71 F.3d 1044 (2d Cir. 1995) (*Amodeo II*)). That presumptive right of access is founded on the concept that the federal government, and especially the unelected branches, should be transparent and accountable to the public. *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 140 (2d Cir. 2004); *Amodeo II*, supra, 71

F.3d at 1048; see also *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597–98 (1978). Judicial documents are those "relevant to the performance of the judicial function and useful in the judicial process." *Amodeo I*, supra, 44 F.3d at 145.[2] The weight to be given to the presumption of public access depends on how significant the document is to the exercise of the judicial function. *Lugosch*, supra, 435 F.3d at 119. Only after determining the weight of the presumption can countervailing interests, such as any privacy interests of those resisting disclosure, be balanced against that right of access. *Id.* at 120.

It is well-settled that the party seeking a protective order bears the burden of proving good cause that documents should not be open to the public for inspection. *Gambale v. Deutsche Bank*, supra, 377 F.3d at 142. Broad allegations of harm, unsubstantiated by specific examples or precisely articulated reasoning, do not satisfy that burden. See, *e.g.*, *Joy v. North*, 692 F.2d 880, 894 (2d Cir. 1982), cert denied sub nom. *Citytrust v. Joy*, 460 U.S. 1051 (1983).

The General Counsel recognizes that not every document responsive to his subpoenas will play a role in the adjudicative process of this tribunal. Further, "[p]rotective orders are useful to prevent discovery from being used as a club by threatening disclosure of matters which will never be used at trial." *Joy v. North*, supra, 692 F.2d at 893. Additionally, agreeing to a process for allowing a party to designate material as confidential eliminates "unnecessary squabbling about whether materials sought [a]re properly subject to confidential treatment." *Salomon Smith Barney, Inc. v. HBO & Co.*, 2001 WL 225040 (S.D.N.Y. March 7, 2001).

But the proposals made by McDonald's and the LaPointe Franchisees impose no reasonable limitations on the materials or testimony that may be designated as confidential. *Compare* McDonald's Mot., Exh. A, ¶ 1 (the McDonald's Proposed Order) (characterizing

[2] Although some of the cited case law speaks in terms of Article III courts, substantially the same need for transparency applies to Administrative Law Judges, who are appointed rather than elected, are not easily recalled, act in a judicial capacity, and are charged with administering the laws of the United States.

employment information and anything "reasonably believe[d]" to contain "business sensitive" or "proprietary information" as confidential) *with* Protective Order, *Boeing Co.*, Case No. 19-CA-032431, § I (Aug. 8, 2011) ("*Boeing* Protective Order") (attached as SEIU Mot., App. A,) (defining "confidential information" as "information . . . maintain[ed] in confidence and which, if disclosed, will cause specific financial and/or competitive harm"). Indeed, the McDonald's Proposed Order does little more than beg the question, defining confidential information circularly as "confidential non-public records." McDonald's Proposed Order ¶1. Respondent's attempt to expand the proper ambit of a protective order should be rejected.

Further, where a party disagrees with the confidential designation given to specific documents or testimony, the McDonald's and LaPointe Franchisee proposals place the burden of objection on the challenger, even though the designating party has not yet established good cause for the designation.[3] *Compare* McDonald's Proposed Order, ¶ 7 *with* SEIU Mot., App. E, Sec. 5 (spelling out clearly that the burden of persuasion in any challenge at all times remains with the party asserting that a document should be sealed). Moreover, as SEIU proposes and as Judge Anderson ordered in *Boeing*, it is appropriate to require the party asserting the confidentiality of a particular document to move to seal that document on the record at such time as the document is sought to be introduced into evidence, or be found to have waived such objection. SEIU Mot., App. E, Sec. 6; *Boeing* Protective Order, § V-A.

Additionally, the McDonald's/LaPointe proposal unnecessarily complicates the conduct of the hearing by requiring designation of a Special Master rather than leaving the matter with

[3] In *Boeing*, Judge Anderson ordered that at such time as any document was designated "confidential," the designating party must submit "a showing of good cause setting forth the reason as to why the document or information must be treated as [c]onfidential." *Boeing* Protective Order, at § II-B. Although neither SEIU nor McDonald's has suggested inclusion of a comparable provision in this case, counsel for the General Counsel believes that inclusion of such a requirement would potentially be appropriate in light of the general presumption in favor of public access to Board proceedings, discussed above.

the Administrative Law Judge in the first instance. *Id.* At such time as Your Honor may determine that appointment of a Special Master is essential to avoid undue delay in this matter, this issue can be revisited, but at this time, it is premature.

Perhaps most troubling is that the McDonald's Proposed Order contains no provision whatsoever to police improper designations of documents as "confidential," apart from a purely hortatory suggestion in ¶1 that such designation will be applied only based upon a "reasonable belief" that a document contains confidential information. As a practical matter, this leaves subpoenaed parties free to make a blanket designation of *every* produced document and *every* transcript page as "confidential." This would force counsel for the General Counsel to meet and confer over every document it wishes to make a part of the public record, then serially object to the sealing of those documents.[4] Some sort of deterrent to abuse is essential here. The Board has awarded litigation expenses where a respondent asserts "transparently nonmeritorious" defenses or otherwise exhibits bad faith in the conduct of litigation before an administrative law judge.[5] Thus, any protective order entered can and should condition such protection on the designating party's acknowledgement that the frivolous designation of materials as "confidential" will subject that party to payment of attorneys' fees and costs incurred as a result of challenging such designations, or other appropriate sanction.[6]

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[4] Furthermore, unlike SEIU's proposal, the McDonald's' Proposed Order contains no time limitation upon the requirement to meet and confer. *Compare* McDonald's Proposed Order, ¶7 (permitting challenges only after "the parties are unable to resolve the objection in good faith") *with* SEIU Mot., App. E, Sec. 5 (limiting obligation to meet and confer to five business days following receipt of a notice of challenge). The five-day limitation contained in SEIU's proposal is appropriate and should be adopted.

[5] *Camelot Terrace*, 357 NLRB No. 161, at 6-10 (Dec. 30, 2011); *see also Teamsters Local 122*, 334 NLRB 1190, 1193 (2001); *Alwin Mfg. Co.*, 326 NLRB 646, 647 (1998), *enfd.* 192 F.3d 133 (D.C. Cir. 1999); *Lake Holiday Manor*, 325 NLRB 469, 469 fn. 5 (1998).

[6] Although its language could be made more explicit, counsel for the General Counsel would accept the sanction provision contained in SEIU Mot., App. E, Section 4 (requiring exercise of restraint and care and exposing designating parties to unspecified sanctions for misuse of designations).

These aspects of the proposals submitted by McDonald's and the LaPointe Franchisees are inconsistent with the established principles set forth above and should therefore be rejected. However, in order to advance the conduct of this litigation—and especially production of the documents responsive to the General Counsel's subpoenas *duces tecum*—as well as to protect non-parties from overreach and oppression, counsel for the General Counsel suggests adopting the protective order proposed by Charging Party SEIU.

Dated: New York, New York
March 19, 2015

___/s/ Jamie Rucker_____
Jamie Rucker, Counsel for the General Counsel

GENERAL COUNSEL'S OPPOSITION TO RESPONDENT McDONALD'S USA, LLC'S MOTION FOR PROTECTIVE ORDER

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on March 19, 2015 I electronically filed the above-entitled document(s) with the National Labor Relations Board and served the above-entitled document(s) upon counsel for the parties by electronic mail at the following addresses:

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